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8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
10 AT TACOMA

11 BRIAN K. JOHNSON,

12 Plaintiff,

13 v.

14 ELDON VAIL, *et al.*,

15 Defendants.
16

CASE NO. C08-5654FDB

REPORT AND
RECOMMENDATION

Noted for April 24, 2009

17 This §1983 Civil Rights matter has been referred to the undersigned Magistrate Judge
18 pursuant to Title 28 U.S.C. §§ 636(b)(1)(A) and 636(b)(1)(B) and Local Magistrates' Rules MJR
19 1, MJR 3, and MJR 4.
20

21 This matter comes before the court upon defendants' motion to dismiss (Doc. 24).
22 Defendants ask the court to dismiss this matter for several reasons, including, (1) Plaintiff's
23 failure to allege or prove that his conviction and sentence were invalid, (2) Plaintiff's failure to
24 exhaust administrative remedies, and (3) Plaintiff's failure to state a cognizable claim for
25 damages. For the reasons set forth below, I recommend that the Court grant defendants' motions
26 to dismiss.

STANDARD

In reviewing a motion to dismiss under Fed. R. Civ. P. 12(b)(6), a court may grant dismissal for failure to state a claim "if it appears beyond doubt that the Plaintiff can prove no set of facts in support of his claim that would entitle him to relief." Keniston v. Roberts, 717 F.2d 1295, 1300 (9th Cir. 1983) (*quoting* Conley v. Gibson, 355 U.S. 41, 45-46, (1957)). Dismissal under Fed R. Civ. P. 12(b)(6) may be based on either the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. Balistreri v. Pacifica Police Dept., 901 F.2d 696, 699 (9th Cir. 1990). A Plaintiff need not set out in detail the facts upon which he bases his claim. However, a Plaintiff must "set out sufficient factual matter to outline the elements of his cause of action or claim, proof of which is essential to his recovery." Benson v. Cady, 761 F.2d 335, 338 (7th Cir. 1985). Although complaints are to be liberally construed in Plaintiff's favor, conclusory allegations of law, unsupported conclusions, and unwarranted inferences need not be accepted as true. Id. Vague and conclusory allegations of official participation in civil rights violations are not sufficient to withstand a motion to dismiss. Pena v. Gardner, 976 F.2d 469, 471 (9th Cir. 1992) (*quoting* Ivey v. Board of Regents of Univ. of Alaska, 673 F.2d 266, 268 (9th Cir. 1982)).

PROCEDURAL BACKGROUND

On October 28, 2008, Plaintiff filed the Complaint in this matter pursuant to 28 U.S.C. § 1983, alleging he was being held at McNeil Island Corrections Center beyond his earned release date (allegedly, Plaintiff had earned good time credit and should have been released on or about July 27, 2008). Plaintiff further alleges that he was retaliated against when he was placed in administrative segregation ("the hole") for eleven days. Plaintiff seeks injunctive relief (release from prison) and compensatory damages in the amount of \$500,000. In lieu of filing an answer

1 to the Complaint, on February 18, 2009 Defendants filed the instant motion to dismiss pursuant
2 to FRCP 12(b)(6).

3 The motion was properly noted for consideration by the court on March 13, 2009.
4 Defendants filed proof that they served the motion on Plaintiff at his address of record on that
5 date. However, Plaintiff filed a change of address with the court on the same date, February 18,
6 2009. Defendants then filed proof on February 20, 2009, showing that Plaintiff was served with
7 a copy of the motion at his new address. To date, Plaintiff has not filed any opposition to the
8 motion to dismiss.
9

10 DISCUSSION

11 Local Rule CR 7(b)(2) provides:

12 If a party fails to file the papers in opposition to a motion, such failure may be
13 considered by the court as an admission that the motion has merit.

14 (Emphasis added).

15 The court also notes that in its Order Directing Service, issued on November 11, 2008, all
16 parties were directed to file any opposition to a motion “not later than 4:30 PM on the Monday
17 immediately preceding the Friday appointed for consideration of the motion” (Dkt. # 3, p. 3).
18 Therefore, plaintiff was given fair notice both in the local rule and by specific order of the court,
19 that he was required to file a response to the motion. See Rand v. Rowland, 154 F.3d 957-58 (9th
20 Cir. 1998).
21

22 Because Plaintiff has failed to oppose the motion to dismiss, the Court should deem
23 Plaintiff’s failure as an admission that the motion has merit and grant defendants’ motion to
24 dismiss.
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1 ***A. Plaintiff's Claims Must Be Dismissed Under Heck v. Humphrey***

2 Moreover, defendants' motion to dismiss has substantive merit because plaintiff failed to
3 allege that his conviction or sentence had been invalidated.

4 In June 1994, the United States Supreme Court held that "[e]ven a prisoner who has fully
5 exhausted available state remedies has no cause of action under § 1983 unless and until the
6 conviction or sentence is reversed, expunged, invalidated, or impugned by the grant of a writ of
7 habeas corpus." Heck v. Humphrey, 512 U.S. 477, 486-89 (1994). The court added:

8 Under our analysis the statute of limitations poses no difficulty while the state
9 challenges are being pursued, since the § 1983 claim has not yet arisen. . . . [A]
10 § 1983 cause of action for damages attributable to an unconstitutional conviction or
11 sentence does not accrue until the conviction or sentence has been invalidated.

12 Id. at 489.

13 Here, Mr. Johnson alleges he is being held beyond his earned release date. This is the
14 type of claim that is normally brought in a petition for writ of habeas corpus not § 1983. Plaintiff
15 has not alleged that his conviction or sentence has been reversed, expunged, invalidated, or
16 impugned by the grant of a writ of habeas corpus. Therefore, plaintiff's § 1983 claim has not yet
17 accrued, and therefore is not cognizable.

18 ***B. Exhaustion Of Available Administrative Remedies Is Required***

19 The Prison Litigation Reform Act ("PLRA") requires exhaustion of administrative
20 remedies prior to filing a complaint in federal court. The relevant portion of the Act states:

21 No action shall be brought with respect to prison conditions under section 1983 of
22 this title, or any other Federal law, by a prisoner confined in any jail, prison, or
23 other correctional facility until such administrative remedies as are available are
24 exhausted.

25 42 U.S.C. § 1997e(a). The Supreme Court has held that inmates must exhaust prison grievance
26 remedies before filing suit if the grievance system is capable of providing any relief or taking

1 any action in response to the grievance. Booth v. Churner, 531 U.S. 956 (2001). The Supreme
2 Court recently reaffirmed the exhaustion requirement in Woodford v. Ngo, 548 U.S. 81, 92
3 (2006).

4 Here, Plaintiff has not alleged that he had attempted to exhaust his administrative
5 remedies, i.e., Plaintiff has failed to present his claims to the prison grievance coordinator and
6 complete the administrative review process. Therefore, defendants' motion to dismiss should be
7 granted.
8

9 ***C. Plaintiff has Failed to Present A Cognizable Claim Against Several Defendants***

10 Finally, to properly state a civil rights cause of action under § 1983, Plaintiff must allege
11 facts showing how individually named defendants caused or personally participated in causing
12 the harm alleged in the complaint. Arnold v. IBM, 637 F.2d 1350, 1355 (9th Cir. 1981). A §
13 1983 suit cannot be based on vicarious liability alone, but instead must allege that the
14 defendants' own conduct violated the plaintiff's civil rights. City of Canton v. Harris, 489 U.S.
15 378, 385-90 (1989). A supervisor may be held liable only "if there exists either, (1) his or her
16 personal involvement in the constitutional deprivation, or (2) a sufficient causal connection
17 between a supervisor's wrongful conduct and the constitutional violation." Redman v. County of
18 San Diego, 942 F.2d 1435, 1446 (9th cir. 1991), *cert. denied* 502 U.S. 1074 (1992).
19

20 Plaintiff's Complaint fails to show how any of the named defendants personally
21 participated in causing any constitutional or civil rights violation. For instance, Plaintiff names
22 Secretary Vail, Superintendent Van Boening, Officer Green and Ms. Paxton as defendants, but
23 the Complaint does not contain an allegation that any of these individuals personally participated
24 in the alleged violation of Plaintiff's civil rights. It also appears Defendants Vail and Van
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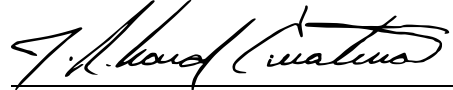
1 Boening are being named in their supervisory capacity, and Plaintiff has not alleged sufficient
2 facts to state a claim against the prison officials based on their personal involvement.

3 **CONCLUSION**

4 Based on the foregoing, Defendants' motion to dismiss should be GRANTED.

5 Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal rules of Civil Procedure,
6 the parties shall have ten (10) days from service of this Report to file written objections. *See*
7 *also* Fed. R. Civ. P. 6. Failure to file objections will result in a waiver of those objections for
8 purposes of appeal. Thomas v. Arn, 474 U.S. 140 (1985). Accommodating the time limit
9 imposed by Rule 72(b), the clerk is directed to set the matter for consideration on April 24, 2009,
10 as noted in the caption.
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12 DATED this 3rd day of April, 2009.
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16 J. Richard Creatura
17 United States Magistrate Judge
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